CRB No. 10-083

JOSEPHINE BEMBRY,
Claimant–Respondent,

v.

GOOD HOPE INSTITUTE and GUARD INSURANCE GROUP,
Employer-Petitioner.

Appeal from a Compensation Order on Remand by
The Honorable Joan E. Knight
AHD No. 08-377A, OWC No. 647887

Jeffrey Ochsman, Esquire for the Petitioner
Matthew Peffer, Esquire for the Respondent

Before MELISSA LIN JONES, LAWRENCE D. TARR, and Heather C. LESLIE,[1] *Administrative Appeals Judges*.

MELISSA LIN JONES, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board ("CRB") pursuant to §§32-1521.01 and 32-1522 of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq*., ("Act"), 7 DCMR §250, *et seq*., and the Department of Employment Services Director's Administrative Policy Issuance 05-01 (February 5, 2005).

FACTS OF RECORD AND PROCEDURAL HISTORY

On March 19, 2008, Ms. Josephine Bembry injured her low back, neck, shoulder, and left leg while working for Good Hope Institute ("Good Hope") as an outpatient, drug rehabilitation supervisor/counselor. In a Compensation Order dated March 13, 2009, she was awarded medical benefits and temporary total disability benefits from May 6, 2008 to the date of the formal hearing and continuing.

[1] Judge Leslie has been appointed by the Director of the DOES as a temporary CRB member pursuant to DOES Administrative Policy Issuance No. 11-02 (June 13, 2011).

Good Hope requested modification of the March 13, 2009 Compensation Order, and on July 21, 2009, an administrative law judge ("ALJ") held a *Snipes* hearing to determine if there was reason to believe a change of condition had taken place. The ALJ concluded there was reason to believe a change of condition had taken place, and on September 8, 2009, a full evidentiary hearing was conducted to determine if Good Hope was entitled to terminate payment of temporary total disability benefits.

On February 16, 2010, a Compensation Order issued. Good Hope's request to terminate wage loss benefits was denied.

On appeal, Good Hope argues the February 16, 2010 Compensation Order should be reversed. Because the ALJ found sufficient evidence to demonstrate reason to believe there had been a change of condition in satisfaction of the *Snipes* requirement, Good Hope contends the prior Compensation Order should have been modified as requested. In addition, Good Hope disputes that vocational rehabilitation efforts were premature because Ms. Bembry was not an "eligible employee."

Ms. Bembry asserts substantial evidence supports the finding she did not unreasonably refuse to participate in vocational rehabilitation because she was still recovering and had not been released to return to work at the time vocational rehabilitation was offered. Ms. Bembry also asserts substantial evidence supports she did not voluntarily limit her income because Good Hope did not identify suitable, available, alternative employment.

ISSUES ON APPEAL

1. Is there substantial evidence in the record to support the ruling that Good Hope failed to prove entitlement to terminate the payment of temporary total disability benefits as awarded in the March 13, 2009 Compensation Order?

2. Is there substantial evidence in the record to support the ruling that Ms. Bembry did not fail to cooperate with vocational rehabilitation because she was not an "eligible employee"?

ANALYSIS

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the appealed Compensation Order are based upon substantial evidence[2] in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law.[3] Consistent with this standard of review, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion.[4]

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[2] "Substantial evidence" is relevant evidence a reasonable person might accept to support a conclusion. *Marriott International v. DOES*, 834 A.2d 882, 885 (D.C. 2003).

[3] Section 32-1521.01(d)(2)(A) of the Act.

[4] *Marriott*, *supra*.

Because a prior Compensation Order had issued in this case on March 13, 2009, the right to an evidentiary hearing to modify that prior Compensation Order is triggered only if there has been a threshold showing that there is reason to believe that a change of condition has occurred.[5] At this stage, the threshold is minimal:

> In order to meet the "reason to believe" standard, "something short of full proof" is required in order to support an evidentiary hearing, with the burden of demonstrating at this stage the existence of a change of condition being described as "a light on." [*sic*] *Walden v. D.C. Dept. of Employment Services,* 759 A.2d 186, 191 (D.C. 2000). The purpose of the preliminary proceeding under section 32-1524 is "to examine evidence which *could* establish, if credited, changed conditions." *Walden,* 759 A.2d at 192. The moving party need only meet a "modest threshold burden of producing minimal evidence to support the 'reason to believe' standard." *Id.* The moving party "need only offer *some evidence* of (1) a change in the fact or the degree of disability, and (2) some initial work-related injury that caused the previous disability." *Id.*[6]

At the evidentiary formal hearing, the burden of proof is higher. Although a party may have succeeded in demonstrating a reason to believe a change of condition has occurred at the *Snipes* hearing, that showing does not guarantee success at the formal hearing.

After a thorough review of the evidence, the ALJ relied upon the opinion of Ms. Bembry's treating physician and determined Ms. Bembry was capable of returning to work with restrictions on walking and stair climbing; however, the inquiry could not stop there because the burden was on Good Hope to demonstrate suitable, alternative employment was made available to Ms. Bembry.[7] Good Hope failed its burden:

> There is no evidence in the record to demonstrate the Employer had indeed recalled the Claimant to her pre-injury job or made a job offer commensurate with her physical limitations and medical restrictions. It appears the Employer incorrectly placed the burden upon the Claimant to 'try to get her job back or return to her job". [*sic*] The record reflects that the Employer has no [*sic*] offered the Claimant any employment since March 2009 or made accommodations for her to return to work since being released by Dr. Byrne in September 2009. (HT P 60). Thus, the Employer failed to show the existence of a viable job offer. Employer has not established Claimant failed to accept employment and until such time the Claimant remains edible [*sic*] to receive temporary totally disabled. [*sic*][8]

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[5] *Washington Metropolitan Area Transit Authority v. DOES,* 703 A.2d 1225 (D.C. 1997); *Snipes v. DOES,* 542 A.2d 832 (D.C. 1988).

[6] *DameGreene v. American Red Cross,* CRB No. 07-095 (August 31, 2007).

[7] *Logan v. DOES,* 805 A.2d 237 (D.C. 2002).

[8] *Bembry v. Good Hope Institute,* AHD No. 08-377A, OWC No. 647887 (February 16, 2010), p.7.

Given the facts and the procedural posture of this case, the test to determine Ms. Bembry's ongoing entitlement to temporary total disability benefits was the same as the test to determine if she voluntarily limited her income, and Good Hope's failure to demonstrate the availability of suitable, alternative employment barred its claim for relief.

The essence of Good Hope's argument that the ALJ erred in failing to terminate Ms. Bembry's entitlement to ongoing benefits can be summed up in its own words, "The Administrative Law Judge was presented with evidence concerning the nature and extent of the claimant's disability, as part of the employer's request to modify the existing Compensation Order."[9] At the formal hearing, the law placed the burden on Good Hope; Good Hope did not satisfy its burden so on appeal it requests we reweigh the evidence in its favor. The CRB lacks the authority to review the evidence in the way Good Hope would hope.[10]

Turning to the issue of failure to cooperate with vocational rehabilitation, the ALJ ruled Good Hope's vocational rehabilitation efforts were "premature as the Claimant was not an 'eligible employee.'"[11] The ALJ did not define "eligible employee," and that phrase is not defined in the Act; however, given the findings that there was no Functional Capacity Evaluation performed to assess Ms. Bembry's work capacity and that there was no evidence Dr. John P. Byrne had released Ms. Bembry to return to work before September 1, 2009, it seems the ALJ determined that Ms. Bembry did not need to participate in vocational rehabilitation because she had not been released to work at the time vocational rehabilitation efforts were offered. This ruling reflects a misconception as to when vocational rehabilitation is appropriate- a physician's release is not required to compel participation in vocational rehabilitation if it does not require physical exertion.[12]

CONCLUSION AND ORDER

We find no error in the denial of Good Hope's request to terminate temporary total disability benefits; however, we are unable to determine the legal basis for Ms. Bembry's not qualifying for participation in vocational rehabilitation. Consequently, the law requires we vacate the portion of the February 16, 2010 Compensation Order ruling "Employer's assertion the Claimant failed to

[9] Memorandum of Points and Authorities in Support of Employer's Application for Review, p.6.

[10] *Marriott, supra*.

[11] *Bembry v. Good Hope Institute*, AHD No. 08-377A, OWC No. 647887 (February 16, 2010), p.6.

[12] See *Black v. DOES*, 801 A.2d 983, 985 (D.C. 2002).

cooperate is without merit"[13] and remand this matter for further proceedings consistent with this Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

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MELISSA LIN JONES
Administrative Appeals Judge

April 13, 2012
DATE

[13] *Bembry v. Good Hope Institute*, AHD No. 08-377A, OWC No. 647887 (February 16, 2010), p.6.